

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE M. THOMAS,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 250323
Wayne Circuit Court
LC No. 03-003652-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN WILLIAM FAIR,

Defendant-Appellant.

No. 250325
Wayne Circuit Court
LC No. 03-003652-02

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

In these consolidated appeals, defendants Terrance Thomas and John Fair were each convicted by a jury of first-degree criminal sexual conduct (“CSC-1”), MCL 750.520b(1)(d)(ii) (sexual penetration accomplished by force or coercion and while aided and abetted by other person). Defendant Thomas was sentenced to three to ten years’ imprisonment, and defendant Fair was sentenced to five to fifteen years’ imprisonment. Both defendants appeal as of right. We affirm.

Defendants were convicted of sexually assaulting the complainant, KH, while they were visiting overnight with KH and her boyfriend, Sean Hill. KH testified at trial that she fell asleep and awoke to find defendant Fair on top of her, forcing himself on her sexually. When Fair was finished, he snapped his fingers and defendant Thomas approached and sexually assaulted KH. Fair and Thomas both gave statements to the police. Thomas admitted that he had intercourse with KH, but maintained that she consented. Fair denied having intercourse, but admitted having consensual, noncoital foreplay with KH. Thomas and Fair were jointly tried before the same jury. Both of their statements were introduced into evidence.

I. Docket No. 250323

Defendant Thomas contends that the evidence was insufficient to support his first-degree CSC conviction because there was no evidence that either defendant aided and abetted the other. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

MCL 750.520b(1)(d)(ii) provides that a defendant is guilty of CSC-1 when he is aided or abetted by one or more other persons and force or coercion is used to accomplish the sexual penetration. Aiding and abetting encompasses “any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime.” *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004); MCL 767.39. KH testified that Thomas approached and assaulted her immediately after Fair finished and snapped his fingers. The jurors could infer from the coordination of defendants’ actions that they were acting in concert to commit consecutive assaults, and that Fair snapped his fingers to signal that it was time for Thomas to assume his role. This inference sufficiently supports the conclusion that defendants jointly encouraged and supported each other in the commission of the offenses.

Thomas argues that the jurors were confused by the instructions on aiding and abetting, because they requested clarification of the definition of accomplice. He argues that the trial court erred in declining to grant that request. When the jurors submitted their request, the trial court replied that the jurors should rely on their collective memory. Defendant did not object to the trial court’s response, so this is an unpreserved claim of error that we review for plain error affecting defendant’s substantial rights. MCL 768.29; *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

We agree that the trial court erred in failing to reply in a manner that was responsive to the jury’s request for supplemental instruction. *People v Katt*, 248 Mich App 282, 311; 639 NW2d 815 (2001). However, the error does not rise to the level of plain error affecting defendant’s substantial rights, because defendant does not contend that the original jury instructions were unclear or erroneous, and because the jury’s verdict is consistent with both the evidence and the applicable law.

II. Docket No. 250325

Defendant Fair argues that the trial court violated MRE 404(b) when it permitted KH to testify that Fair had previously been in jail. The trial court sustained Fair’s objection when KH testified on direct examination that she did not attempt to fight off Fair because he had just gotten out of jail. KH later testified, on cross-examination by Thomas, that she feared retaliation from both defendants because Fair had been in jail and Thomas was his friend. Fair objected, but the trial court overruled the objection, commenting that the testimony was elicited by codefendant’s counsel. Fair preserved this issue with a timely objection. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review the trial court’s decision to admit the testimony for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401; see also *Aldrich, supra* at 114. Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence which is not relevant is not admissible. *Id.*; MRE 402. Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.” *Aldrich, supra*; see also MRE 403. MRE 404(b) excludes evidence of prior bad acts to prove a person’s character, but permits the admission of such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system. To be admissible, the evidence must be offered for something other than a character or propensity purpose, it must be relevant under MRE 401, and the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004).

Pursuant to these principles, KH’s testimony on direct examination that she did not try to fight off Fair because he had been in jail was not inadmissible under MRE 404(b). The testimony was relevant to the issue of consent, because it explained why KH was too fearful of Fair to physically resist his unwelcome advances. It also explained why KH did not immediately attempt to flee her boyfriend’s house and report the assault. The trial court could have averted unfair prejudice with an appropriate limiting instruction. MRE 105; *Knox, supra* at 509.

The admissibility of this testimony during Thomas’ cross-examination is problematic, because the trial court’s stated reason for admitting the testimony was erroneous. A defendant may not claim error based on a witness’ responsive answer to his own question, *People v Whetstone*, 119 Mich App 546, 554; 326 NW2d 552 (1982), but it does not logically follow that this principle applies to a codefendant’s question. Therefore, the fact that the testimony was elicited by Fair’s codefendant was not a proper basis for overruling Fair’s objection.

However, this Court will not reverse a trial court’s decision if it reached the right result for the wrong reason. *People v Goold*, 241 Mich App 333, 342 n 3; 615 NW2d 794 (2000). KH’s testimony about Fair’s incarceration was admissible because it was relevant to both the prosecution and defense theories. Defendants tried to discredit KH by emphasizing that she submitted to defendants without resistance, remained in the house after the alleged assaults, and did not report the assaults until later the next day. The prosecutor responded that KH feared harm and retaliation from defendants if she resisted, fled, or reported the attacks, and that her fear was reasonable because Fair had been in jail. Thomas’ cross-examination was apparently intended to suggest that KH’s fear of Fair did not explain her fear of Thomas.

Though KH’s reference to Fair’s incarceration was responsive to questions intended to bolster Thomas’ defense, it was prejudicial to Fair, without making Fair’s guilt more or less probable for any non-character or non-propensity reason. Despite this, Fair could have mitigated the prejudicial effect by requesting a limiting instruction. More importantly, the testimony should have been allowed during direct examination; consequently, the trial court in effect belatedly allowed the testimony that it had previously excluded in error. Under these circumstances, reversal is not required.

Fair also claims that his Sixth Amendment right of confrontation was violated by the admission of Thomas' statement. Despite the lack of an objection at trial, he argues that this unpreserved matter was plain error, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), and that his counsel was ineffective for failing to object.

In *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that testimonial statements by a non-testifying witness are admissible only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. See also *People v Bell*, 264 Mich App 58, 61; 689 NW2d 732 (2004). Though the exact scope of the term "testimonial" remains undefined, this Court has determined that statements taken by police officers in the course of interrogations are testimonial. *Id.* at 62. Consequently, Thomas' statement was inadmissible under *Crawford* because it was a testimonial statement and defendant Fair had no opportunity to cross-examine Thomas. Although *Crawford* was decided after defendant was convicted, this Court has held that it applies retroactively to cases pending at the time it was decided. *Bell, supra* at 62.

Thomas' statement did not inculcate Fair, and Thomas corroborated Fair's statement that KH sexually enticed both defendants. Fair claims that Thomas' statement was prejudicial because it conflicted with Fair's statement with regard to whether KH and her boyfriend, Sean Hill, had sex. Fair indicated in his statement that he left the basement briefly, and returned to find that KH and Hill were starting to have sex. Thomas, however, stated that he did not see Hill have sex with KH. Fair contends that this discrepancy rendered the statements "irreconcilable," and that it cast doubt on both defendants' credibility. This discrepancy was too minor and too collateral to affect the jury's credibility assessments. Consequently, Fair cannot establish that his substantial rights were affected. Fair also cannot prevail on his ineffective assistance of counsel theory, because he cannot show a reasonable probability that the outcome would have been different had counsel objected to the introduction of the statement. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens